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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ELAINE MARGIE PAULUS et al., Plaintiffs and Respondents, v. J-M MANUFACTURING COMPANY, INC., Defendant and Appellant.	B269904 (Los Angeles County Super. Ct. Nos. JCC4674/BC437739)

APPEAL from an order of the Superior Court of Los Angeles County, Emilie H. Elias, Judge. Affirmed.

Manion Gaynor & Manning, John T. Hugo, Carrie Lin and Abigal P. Adams for Plaintiffs and Respondents.

Simon Greenstone Panatier Bartlett and Brian P. Barrow for Defendant and Appellant.

Appellant, the defendant in trial court proceedings, appeals from an order denying its motion to seal material in the court file of this settled wrongful death case. We shall affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

This case arises out of asbestos litigation. The plaintiffs are the widow and children of William Paulus, who died in December 2009 as a result of mesothelioma. Mr. Paulus was a plumber, and it is alleged that the mesothelioma was the result of his exposure to pipes coated with a substance containing asbestos, and that the pipes were manufactured and sold by J-M Manufacturing Co. (referred to here as "J-MM" and sometimes in quoted materials as "JM").

Plaintiffs sued J-MM and others for wrongful death. During the pendency of that case J-MM and another defendant brought motions for summary adjudication in which they argued plaintiffs lacked evidence. In its opposition to these motions plaintiffs' counsel filed memorandum papers which attached portions of the record from other litigation, including a memorandum from J-MM's house counsel to an executive of that firm discussing the risk-benefit exposure of the firm with respect to its products containing asbestos. The document was clearly labeled as confidential under the attorney-client privilege. No objection was raised at that time with respect to the attorney-client privilege. The trial court denied the summary adjudication motion, finding there were material issues of fact to justify the case going forward.

Shortly after this ruling counsel for J-MM moved to seal the papers and references to the other litigation. The trial court denied the motion, but pointed out that the attorney-client

evidentiary privilege applied whether or not the documents were sealed. The court did not base its order denying summary adjudication in whole or in part on the privileged material. Shortly after the denial of its motion to seal, the Paulus plaintiffs and J-MM settled the litigation. Based on the settlement, and at the request of plaintiffs' counsel, the lawsuit against J-MM was dismissed with prejudice. The settlement made no provision with respect to this privileged material. (The other defendant party which together with J-MM sought an order sealing these records proceeded to trial, resulting in a judgment for plaintiff which was affirmed on appeal. (See *Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357.)

The documents that had been filed with the trial court prior to the settlement and dismissal of the lawsuit show that the confidential materials at issue in this appeal had been filed in previous trial court asbestos litigation, notably in a California trial court case (*Hardcastle v. Advocate Mines, et al.*, Alameda County Superior Court No. 830058-2) and in a State of Washington case (*Dawes v. Certainteed Corp., et al.* (No. 10-2-11903-1), both preceding the underlying litigation in this case. (In the *Dawes* case the record also includes unsealed testimony by J-MM's expert with respect to asbestos materials on pipes manufactured by J-MM or its predecessor.) J-MM's counsel stated that to the best of her knowledge, the document "may have been inadvertently included in a very large production which occurred in 2000 in the *Hardcastle* case, or inappropriately taken by plaintiffs' counsel in that case during a review of documents not attended by defense counsel." Counsel also stated that J-MM had taken "all appropriate steps to seek the return of the

document and protect the privilege" and believed that it had done so.

Some ten years after the *Hardcastle* litigation, "the Privileged Memorandum resurfaced in the hands of multiple plaintiffs' counsel across the country." J-MM sought relief in this case "on an immediate/ex parte basis because plaintiffs' firms litigating asbestos-related matters against J-MM outside of the jurisdiction of the Los Angeles Superior Court, including [respondents' counsel in this case] are now arguing to other Courts across the county that the 'theoretical availability' of the Memorandum through the review of the docket in this case constitutes an act of waiver of the attorney-client privilege by J-MM." It also was shown that unsealed material in court files is available through a commercial server, the Lexis File & Serve website, and that the Memorandum in this case has been publicly available through that source since June 2012.

Some three years after the settlement and dismissal of the lawsuit in the trial court J-MM filed a new motion, using the same Superior Court file number that was used in the settled litigation, renewing its motion to seal. The trial court asked for supplemental briefing on whether it had authority to seal the court records and whether J-MM had waived the attorney-client privilege with respect to this litigation. Several weeks later, in November 2015, the trial court denied the renewed application to seal the records. The court explained its ruling in detail:

"The California Supreme Court has recognized a First Amendment right of public access to civil litigation documents filed for use at trial or in connection with an adjudicatory motion." (Citing *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1208–1209, fn. 25.) "Indeed, civil

courtroom proceedings, and the records pertaining to the proceedings are 'presumptively open' . . . While these principles normally would not apply to privileged documents, this Court is confronted with a unique scenario. The relevant documents, which Plaintiffs filed in opposition to JMM's motion for summary judgment, have been available in the Court's public file for approximately three years. JMM has known the documents are in the public file the entire time without taking action to file a proper motion to seal. Even if JMM's conduct did not cause a waiver, case law instructs that Rules 2.550 and 2.551, as a matter of policy, should not be interpreted to allow 'an open-ended timeframe for filing a motion to seal records long after the underlying substantive matter has been decided[.]" (Quoting from *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 601, and citing Weil & Brown, Cal. Practice Guide, Civil Procedure Before Trial (The Rutter Group 2015) ¶ 9:417.5, p. 9(I)-181 as stating that courts "'cannot entertain a motion to seal documents that are already a matter of public record.'") "To rule otherwise 'would defeat the purpose of the rules.' [Citation.] Therefore, since this Court decided summary judgment in July 2012 . . . and since JMM waited more than three years to bring the motion to seal despite knowing the documents' location in the public file, the motion must be denied as untimely due to the long passage of time."

The court added that it "is mindful of JMM's concern that a ruling in Plaintiffs' favor will set a harmful precedent, but the Court believes the threat is overstated. During the three years that the documents have been in the public file, other parties and attorneys likely read them and copied them. Sealing the documents now, consequently, would not un-ring the bell, yet

J-MM still possesses a remedy to combat this situation. As it did in this action, J-MM remains free to seek a protective order in any litigation in which any party attempts to use the documents against J-MM. Furthermore, a timely motion to seal will continue to be a remedy available to any party aware that its privileged document has been filed by another party." The court later denied J-MM's motion for reconsideration of the ruling.

This appeal followed.

DISCUSSION

As we shall explain, we find no abuse of discretion in the trial court's ruling.

I

At the outset, we discuss whether the trial court and, by extension, this court, had jurisdiction to entertain and rule on the merits of appellant's motion to seal, filed three years after the final settlement and dismissal of the underlying litigation. Because the parties did not discuss this issue in their initial briefing we asked that they do so by letter brief, and they have done so.

Appellant argues the court retains jurisdiction under the general authority of Code of Civil Procedure section 128 (courts have power to "compel obedience to its judgments, orders, and process" and "to amend and control its process and orders so as to make them conform to law and justice"). It cites *Lofton v. Wells Fargo Home Mortgage* (2014) 230 Cal.App.4th 1050, 1061 and, more broadly, *Roth v. Marston* (1951) 110 Cal.App.2d 249, 251 (absent statutory limitation, courts have not only "the inherent power, but [the] plain duty to remedy clerical errors [in its orders]"). *Lofton* involved the retention of jurisdiction under

Code of Civil Procedure section 664.6 to enforce settlements. The motion to seal in this case was hardly a motion to enforce the settlement the parties had entered into three years before. And, unlike *Roth*, the belated motion to seal in this case is not addressed to any sort of clerical error.

Respondents argue that since there was a full dismissal of the entire lawsuit pursuant to the settlement, and there is no claim that the terms of the settlement were not satisfied, nothing remained for the trial court to do in this case, citing *Gorgi v. Jack in the Box, Inc.* (2008) 166 Cal.App.4th 255, 269 and other authority.

The jurisdictional issue was raised before the trial court by appellant's motion filed three years after dismissal of the entire action pursuant to the settlement agreement. The trial court ruled on the merits of the motion to seal, rather than on the jurisdictional question, and the parties did not discuss that issue on appeal until asked to do so by our letter. We conclude respondents have the better of the argument: the showing made before the trial court was not sufficient to vest it with jurisdiction to grant the motion to seal on the bases argued. However, we do not rest our decision on that ground but, instead, also conclude that, even if the trial court retained jurisdiction to rule on the post-judgment motion to seal, it did not abuse its discretion in denying relief. We turn to our basis for that decision.

II

As a preliminary matter, the parties disagree as to whether rules 2.550 and 2.551 (formerly rules 243.1 and 243.2) of the California Rules of Court apply to this case. These rules apply to records sealed or proposed to be sealed by the trial court. The

trial court cited them as authority in its decision to deny the request for sealing.

As we have discussed, at least initially, the trial court appears to have considered these rules as applicable to the case. Whether they are or not is arguable. The view that they do not apply is based on subparts (2) and (3) of subdivision (a) of rule 2.550. Subpart (a)(2) states that the rules "do not apply to records that are required to be kept confidential by law," and subpart (a)(3) provides they "do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings." The argument that they do apply appears to be based on the broad public policy the rules reflect.

The dispute is largely academic since the same result is required in either case. If the rules are applicable, they should have been applied unless there was good reason for not doing so. And even if they are not applicable, ample precedent leads to the same result: privileged material inadvertently disclosed should be protected, provided the offended party takes prompt action to do so.

Thus, in *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656–657, a case arising before adoption of the rules, we held that "[w]hen a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then

proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact." We also held that it is the burden of the lawyer who seeks to hold another accountable for misuse of inadvertently received confidential materials to persuasively demonstrate inadvertence, and that this is the standard governing the conduct of California lawyers confronted with the dilemma presented in that case. Later, our Supreme Court held this rule is a fair and reasonable approach to the problem. (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817.)

In this case the rules were in place when Mr. Paulus died in 2009. Yet J-MM's counsel did not cite them or argue the principle they reflect when the summary motion was filed or when it was argued. No motion to seal was presented until after the trial court had denied the motion. Shortly after that, the parties settled the case and, pursuant to the settlement, the Paulus parties dismissed their suit with prejudice. In doing so they did not seek to preserve any claim that the documents (and any copies that might exist under J-MM's control) be returned or destroyed. The documents were not mentioned at all. And by that time it was readily knowable and indeed was known that the legal advice memorandum had been widely circulated among plaintiffs' attorneys. By the time J-MM finally sought to take some action in this case almost three years had passed. And by counsel's own acknowledgment, although not in their words, it

had "gone viral." It was widespread and apparently being used in other litigation.

The trial court concluded that under these circumstances a sealing order would have served no purpose. We find no abuse of discretion in the trial court's denial of a sealing order in these circumstances.

III

Finally, we note that in its argument on appeal J-MM has occasionally has conflated two related but distinct concepts: sealing of records and admissibility of evidence. The trial court's first ruling in this dispute was that, while it was not ordering the records sealed, it recognized that they retained their privileged character: they were subject to the attorney-client privilege. It would have defied reason to find they were not. The documents were plainly and prominently marked as "confidential" and "attorney-client" material. And they dealt with a issue obviously subject to the attorney-client privilege: legal advice from attorney to client. And, we note, the parties agree that they were not cited in the moving or opposition papers on the summary judgment motion. Thus, while the documents were not sealed, they also were not admissible over attorney-client objection.

DISPOSITION

The order of the trial court denying appellant's renewed motion to seal records is affirmed. Respondents shall have their costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.